

Tanya E. Moore, SBN 206683  
MOORE LAW FIRM, P.C.  
300 South First Street Ste. 342  
San Jose, California 95113  
Telephone (408) 298-2000  
Facsimile (408) 298-6046  
E-mail: [service@moorelawfirm.com](mailto:service@moorelawfirm.com)  
[tanya@moorelawfirm.com](mailto:tanya@moorelawfirm.com)

Attorney for Plaintiff  
Gerardo Hernandez

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

GERARDO HERNANDEZ,	) No.
	)
Plaintiff,	) <b>COMPLAINT ASSERTING DENIAL OF</b>
	) <b>RIGHT OF ACCESS UNDER THE</b>
vs.	) <b>AMERICANS WITH DISABILITIES ACT</b>
	) <b>FOR INJUNCTIVE RELIEF,</b>
AU ENERGY, LLC dba EMBARCADERO	) <b>DECLARATORY RELIEF, DAMAGES,</b>
SHELL; EDGEWOOD SC LLC;	) <b>ATTORNEYS' FEES AND COSTS (ADA)</b>
	)
Defendant.	)
	)
	)

**I. SUMMARY**

1. This is a civil rights action by plaintiff GERARDO HERNANDEZ (“Plaintiff”) for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Embarcadero Shell  
1161 Embarcadero Road  
Palo Alto, CA 94303  
(hereafter “the Facility”)

2. Plaintiff seeks damages, injunctive and declaratory relief, attorney fees and costs, against AU ENERGY LLC dba EMBARCADERO SHELL and EDGEWOOD SC LLC (collectively “Defendants”), pursuant to Title III of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.) (“ADA”) and related California statutes.

**II. JURISDICTION**

3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA claims.

4. Supplemental jurisdiction for claims brought under parallel California law – arising from the same nucleus of operative facts – is predicated on 28 U.S.C. § 1367.

5. Plaintiff’s claims are authorized by 28 U.S.C. §§ 2201 and 2202.

**III. VENUE**

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Northern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b), (c).

**IV. PARTIES**

7. Defendants own, operate, and/or lease the Facility, and consist of a person (or persons), firm, and/or corporation. Specifically, Defendant AU ENERGY LLC dba EMBARCADERO SHELL owns and operates the real property parcel on which the gas station is located and owns and operates the business known as Embarcadero Shell, and Defendant EDGEWOOD SC LLC owns and operates the adjacent parcel containing a shopping center, where parking is provided for the use of gas station customers.

8. Plaintiff is substantially limited in his ability to walk, and must use a wheelchair for mobility. Consequently, Plaintiff is “physically disabled,” as defined by all applicable California and United States laws, and a member of the public whose rights are protected by these laws.

**V. FACTS**

9. The Facility is open to the public, intended for non-residential use, and its operation affects commerce. The Facility is therefore a public accommodation as defined by applicable state and federal laws.

10. Plaintiff lives less than two miles from the Facility and visited the Facility on or about April 18, 2023 to purchase gasoline for his vehicle. During his visit to the Facility, Plaintiff personally encountered barriers (both physical and intangible) that interfered with, if

1 not outright denied, Plaintiff's ability to use and enjoy the goods, services, privileges and  
2 accommodations offered at the Facility. These barriers include, but are not necessarily limited  
3 to, the following:

4           a) Although parking stalls are provided for use by customers of the  
5 Facility, no accessible parking is provided serving the Facility. Plaintiff  
6 wanted to park in a designated accessible parking stall so he could take  
7 his time going into the Facility's convenience store to pay the cashier in  
8 person for his gas. Plaintiff requires a properly configured accessible  
9 parking stall with adjacent clear and level access aisle within which to  
10 unload and transfer into his wheelchair. Because he could not find any  
11 accessible parking near the Facility, Plaintiff had to leave his vehicle at  
12 the gas pump while he went inside the store to pay.

13           b) Plaintiff was not able to find a clear path of travel from the fuel pump to  
14 the Facility's entrance. The route designated by hash marks was  
15 obstructed in several locations by trash cans and other obstacles. The  
16 route Plaintiff took had an uneven surface, making him feel unsafe and  
17 uncomfortable using his wheelchair to wheel across the route.

18           c) The transaction counter was too high, making it difficult for Plaintiff to  
19 view the prompts on the transaction device and complete his transaction.

20           11. There may exist other barriers at the Facility which relate to Plaintiff's  
21 disabilities, and he will seek to amend this Complaint once such additional barriers are  
22 identified as it is Plaintiff's intention to have all barriers which exist at the Facility and relate to  
23 his disabilities removed to afford him full and equal access.

24           12. Plaintiff was, and continues to be, deterred from visiting the Facility because  
25 Plaintiff knows that the Facility's goods, services, facilities, privileges, advantages, and  
26 accommodations were and are unavailable to Plaintiff due to Plaintiff's physical disabilities.  
27 Plaintiff enjoys the goods and services offered at the Facility, and will return to the Facility  
28 once the barriers are removed.

13. Defendants knew, or should have known, that these elements and areas of the Facility were inaccessible, violate state and federal law, and interfere with (or deny) access to the physically disabled. Moreover, Defendants have the financial resources to remove these barriers from the Facility (without much difficulty or expense), and make the Facility accessible to the physically disabled. To date, however, Defendants refuse to either remove those barriers or seek an unreasonable hardship exemption to excuse non-compliance.

14. At all relevant times, Defendants have possessed and enjoyed sufficient control and authority to modify the Facility to remove impediments to wheelchair access and to comply with the 1991 ADA Accessibility Guidelines and/or the 2010 ADA Standards for Accessible Design. Defendants have not removed such impediments and have not modified the Facility to conform to accessibility standards. Defendants have intentionally maintained the Facility in its current condition and have intentionally refrained from altering the Facility so that it complies with the accessibility standards.

15. Plaintiff further alleges that the (continued) presence of barriers at the Facility is so obvious as to establish Defendants' discriminatory intent. On information and belief, Plaintiff avers that evidence of this discriminatory intent includes Defendants' refusal to adhere to relevant building standards; disregard for the building plans and permits issued for the Facility; conscientious decision to maintain the architectural layout (as it currently exists) at the Facility; decision not to remove barriers from the Facility; and allowance that Defendants' property continues to exist in its non-compliant state. Plaintiff further alleges, on information and belief, that the Facility is not in the midst of a remodel, and that the barriers present at the Facility are not isolated or temporary interruptions in access due to maintenance or repairs.

## **VI. FIRST CLAIM**

### **Americans with Disabilities Act of 1990**

#### **Denial of "Full and Equal" Enjoyment and Use**

16. Plaintiff re-pleads and incorporates by reference the allegations contained in each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

//

1           17. Title III of the ADA holds as a “general rule” that no individual shall be  
2 discriminated against on the basis of disability in the full and equal enjoyment (or use) of  
3 goods, services, facilities, privileges, and accommodations offered by any person who owns,  
4 operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

5           18. Defendants discriminated against Plaintiff by denying Plaintiff “full and equal  
6 enjoyment” and use of the goods, services, facilities, privileges and accommodations of the  
7 Facility during each visit and each incident of deterrence.

8                           Failure to Remove Architectural Barriers in an Existing Facility

9           19. The ADA specifically prohibits failing to remove architectural barriers, which  
10 are structural in nature, in existing facilities where such removal is readily achievable. 42  
11 U.S.C. § 12182(b)(2)(A)(iv).

12           20. When an entity can demonstrate that removal of a barrier is not readily  
13 achievable, a failure to make goods, services, facilities, or accommodations available through  
14 alternative methods is also specifically prohibited if these methods are readily achievable. *Id.*  
15 § 12182(b)(2)(A)(v).

16           21. Here, Plaintiff alleges that Defendants can easily remove the architectural  
17 barriers at the Facility without much difficulty or expense, that the cost of removing the  
18 architectural barriers does not exceed the benefits under the particular circumstances, and that  
19 Defendants violated the ADA by failing to remove those barriers, when it was readily  
20 achievable to do so.

21           22. In the alternative, if it was not “readily achievable” for Defendants to remove  
22 the Facility’s barriers, then Defendants violated the ADA by failing to make the required  
23 services available through alternative methods, which are readily achievable.

24                           Failure to Design and Construct an Accessible Facility

25           23. Plaintiff alleges on information and belief that the Facility was designed and  
26 constructed (or both) after January 26, 1993 – independently triggering access requirements  
27 under Title III of the ADA.

28 //

24. The ADA also prohibits designing and constructing facilities for first occupancy after January 26, 1993, that aren't readily accessible to, and usable by, individuals with disabilities when it was structurally practicable to do so. 42 U.S.C. § 12183(a)(1).

25. Here, Defendants violated the ADA by designing and constructing (or both) the Facility in a manner that was not readily accessible to the physically disabled public – including Plaintiff – when it was structurally practical to do so.<sup>1</sup>

#### Failure to Make an Altered Facility Accessible

26. Plaintiff alleges on information and belief that the Facility was modified after January 26, 1993, independently triggering access requirements under the ADA.

27. The ADA also requires that facilities altered in a manner that affects (or could affect) its usability must be made readily accessible to individuals with disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering an area that contains a facility's primary function also requires making the paths of travel, bathrooms, telephones, and drinking fountains serving that area accessible to the maximum extent feasible. Id.

28. Here, Defendants altered the Facility in a manner that violated the ADA and was not readily accessible to the physically disabled public – including Plaintiff – to the maximum extent feasible.

#### Failure to Modify Existing Policies and Procedures

29. The ADA also requires reasonable modifications in policies, practices, or procedures, when necessary to afford such goods, services, facilities, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

30. Here, Defendants violated the ADA by failing to make reasonable modifications in policies, practices, or procedures at the Facility, when these modifications were necessary to afford (and would not fundamentally alter the nature of) these goods, services, facilities, or accommodations.

---

<sup>1</sup> Nothing within this Complaint should be construed as an allegation that Plaintiff is bringing this action as a private attorney general under either state or federal statutes.

Failure to Maintain Accessible Features

31. Defendants additionally violated the ADA by failing to maintain in operable working condition those features of the Facility that are required to be readily accessible to and usable by persons with disabilities.

32. Such failure by Defendants to maintain the Facility in an accessible condition was not an isolated or temporary interruption in service or access due to maintenance or repairs.

33. Plaintiff seeks all relief available under the ADA (i.e., injunctive relief, attorney fees, costs, legal expense) for these aforementioned violations. 42 U.S.C. § 12205.

34. Plaintiff seeks a finding from this Court (i.e., declaratory relief) that Defendants violated the ADA in order to pursue damages under California's Unruh Civil Rights Act.

**VII. SECOND CLAIM**

**Unruh Act**

35. Plaintiff re-pleads and incorporates by reference the allegations contained in each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

36. California Civil Code § 51 states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

37. California Civil Code § 51.5 also states, in part that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.

38. California Civil Code § 51(f) specifically incorporates (by reference) an individual's rights under the ADA into the Unruh Act.

39. Defendants' aforementioned acts and omissions denied the physically disabled public – including Plaintiff – full and equal accommodations, advantages, facilities, privileges and services in a business establishment (because of their physical disability).

40. These acts and omissions (including the ones that violate the ADA) denied, aided or incited a denial, or discriminated against Plaintiff by violating the Unruh Act.





1           4.       Attorneys' fees, litigation expenses, and costs of suit.<sup>2</sup>

2           5.       Interest at the legal rate from the date of the filing of this action.

3           6.       For such other and further relief as the Court deems proper.

4           Dated: 06/06/2023

MOORE LAW FIRM, P.C.

6                       /s/ Tanya E. Moore

7                       Tanya E. Moore

8                       Attorney for Plaintiff

Gerardo Hernandez

27 \_\_\_\_\_  
28 <sup>2</sup> This includes attorneys' fees under California Code of Civil Procedure § 1021.5.

**VERIFICATION**

I, GERARDO HERNANDEZ, am the plaintiff in the above-entitled action. I have read the foregoing Complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

Dated: 06/06/2023

/s/ Gerardo Hernandez  
Gerardo Hernandez

I attest that the original signature of the person whose electronic signature is shown above is maintained by me, and that his concurrence in the filing of this document and attribution of his signature was obtained.

/s/ Tanya E. Moore  
Tanya E. Moore  
Attorney for Plaintiff,  
GERARDO HERNANDEZ